BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THIS COURT SHOULD CRAFT A NARROW RULING WHICH ADDRESSES THE PRECISE FACTS OF THE MUST CARRY PROVISIONS AND AVOIDS PREJUDGING CONSTITUTIONAL CHALLENGES TO OTHER PROVISIONS OF THE 1992 CABLE ACT	5
II. THE NATURE OF THE GOVERNMENTAL RESTRICTION RATHER THAN THE MEDIUM OF DISTRIBUTION SHOULD PROVIDE THE FRAMEWORK FOR THE APPROPRIATE LEVEL OF CONSTITUTIONAL REVIEW	7
A. Strict Scrutiny Analysis Predicated Upon The Print Press Model Is An Inapposite Framework For Must Carry Review	8
B. *O'Brien* Provides An Appropriate Framework For Constitutional Review Of Government Regulations That Incidentally Restrict Expressive Content	9
C. The Must Carry Provisions Are Not Unconstitutional Because They "Single Out" The Cable Industry	10
III. THE COURT SHOULD SCRUPULOUSLY AVOID CONFERRING SUPERIOR FIRST AMENDMENT STATUS UPON CABLE RELATIVE TO COMPETING ELECTRONIC MEDIA	13
A. The Paramount First Amendment Rights Of Viewers Militate Against Greater First Amendment Protection For Cable Than That Afforded Its Competitors	14

B. The Court Should Rule Narrowly To Preserve Congress' Ability To Make The Factual Determinations that Will Be Required To Reconcile The Interests Of Viewers And Service Providers In A Dynamic And Converging Communications Marketplace 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: Page

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 5

Associated Press v. United States, 326 U.S. 1 (1945) 10

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 5

Daniels Cablevision v. United States, No. 92-2292, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993) 2,6

Daniels Cablevision v. United States, No. 93-5290 (D.C. Cir. consolidated Dec. 2, 1993) 2

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 14

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 11,14

F. S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) 16

Hodel v. Indiana, 452 U.S. 314 (1981) 12

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 5

Kremens v. Bartley, 431 U.S. 119 (1977) 5

Leathers v. Medlock, — U.S. — , 111 S. Ct. 1438 (1991) 11

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 10

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 17

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 8

National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 13,15

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 4,7,14,16

Table of Authorities Continued

	Page
Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983)	11
Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986)	9
Storer Cable v. City of Montgomery, Alabama, 806 F. Supp. 1518 (M.D. Ala. 1992)	11,12
United States v. Midwest Video Corp., 406 U.S. 649 (1972)	13,17
United States v. O'Brien, 391 U.S. 367 (1968)	9
United States v. Southwestern Cable Co., 392 U.S. 157 (1968)	13
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	14
Ward v. Rock Against Racism, 491 U.S. 781 (1989)	9,10
Warner Cable Communications v. City of Niceville, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, — U.S. —, 111 S. Ct. 2839 (1991)	11

STATUTES & LEGISLATIVE MATERIALS:

47 U.S.C. §628 (1992)	2
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 2(a), 2(b)(1)-(2), 4, 5, 19, 106 Stat. 1460 (1992)	*passim*
Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934)	3
House Committee on Energy and Commerce, H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992)	7
H.R. 3626, 103d Cong., 1st Sess. (1993)	18
H.R. 3636, 103d Cong., 1st Sess (1993)	18

Table of Authorities Continued

	Page
S. 1086, 103d Cong., 1st Sess., 139 Cong. Rec. S37023-28 (1993)	18
Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. (1992)	7
U.S. Const. art. I, § 8, cl. 3	12

MISCELLANEOUS:

Boyle, *Satellite Ops Brace for Digital Compression*, Broadcasting & Cable, Feb. 22, 1993	15
Rosenthal, *Broadcast TV Networks Eyeing Compression Gear*, Electronic Media, Jan. 18, 1993	15
Administration Planning Complete Overhaul of Communications Act, Communications Daily, Nov. 12, 1993	18
Tribe, *American Constitutional Law*, § 16-1 (2d ed. 1988)	16

BRIEF *AMICI CURIAE* OF DIRECTV, INC. AND THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE, IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*[1]

Amicus DirecTv, Inc., a subsidiary of Hughes Communications, Inc., is on the verge of providing an alternative multichannel video programming distribution service to cable television. DirecTv's sister subsidiary, Hughes Communications Galaxy, Inc., ("HCG") has been licensed by the Federal Communications Commission ("FCC") to provide high-power Direct Broadcast Satellite ("DBS") service, enabling viewers throughout the nation to receive approximately 150 channels of video programming using an 18" receiving dish. The first American high-power DBS satellite is scheduled to be launched in December, 1993. DirecTv intends to commence programming service in the spring of 1994.

Amicus National Rural Telecommunications Cooperative ("NRTC") is a non-profit corporation, owned and controlled by 521 rural electric cooperatives and 231 rural telephone systems located throughout 49 states. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America on an affordable basis. On April 10, 1992, NRTC signed a DBS Distribution Agreement with HCG to provide DBS services including 20 channels of popular cable programming to rural subscribers across the country.

---

[1] Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

Amici have a demonstrable stake in the outcome of this proceeding because of its potential precedential effect on litigation challenging the constitutionality of other provisions of the Cable Television Consumer Protection and Competition Act of 1992[2] ("1992 Cable Act"). Specifically, *Amici* have a direct interest in continuing to sustain the constitutionality of Section 19 of the 1992 Cable Act which was upheld by the United States District Court for the District of Columbia in *Daniels Cablevision v. United States*, No. 92-2292, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993). That decision is currently on appeal. *Daniels Cablevision v. United States*, No. 93-5290 (D.C. Cir. consolidated Dec. 2, 1993). All proceedings in that appeal are being held in abeyance, pending this Court's decision in this case.[3]

Amici believe that Section 19 is indispensable to the development of competition in the multichannel video programming distribution market and to the broad deployment of new technologies, such as DBS, which are capable of enhancing the nation's communications and information infrastructure. Section 19 is a purely economic, structural measure which prohibits vertically integrated cable companies from engaging in "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or customers." *See* 47 U.S.C. § 628 (1992). Congress

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[3] The court so ordered on December 2, 1993.

enacted this provision to address specific, documented anticompetitive practices.

Amici's interest is in ensuring that this Court's ruling does not prejudge the outcome of the pending challenge to Section 19 and does not create a constitutional regime which gives favored First Amendment treatment to cable, thereby discriminating against DBS, a competitive multichannel video programming distribution service. This interest is unique and not likely to be asserted by the parties.

SUMMARY OF ARGUMENT

Amici respectfully request that this Court, in adjudicating the constitutionality of the must carry provisions, §§ 4 and 5 of the 1992 Cable Act, refrain from issuing a broad ruling that might have the effect of prejudicing the defense of Section 19 of the 1992 Cable Act against pending constitutional challenge.

A decision announcing a technology-based analytical framework, particularly a print press model, for evaluating the constitutionality of all regulation affecting the cable industry would be particularly dangerous. A decision conferring preferred First Amendment status on cable at the expense of competing electronic media, such as broadcast, satellite or telephonic delivery of video programming, could skew radically the development of these different technologies to the detriment of competition, diversity and universal service, core values of the Communications Act of 1934[4]. Such a ruling could seriously limit the ability of Congress to regulate this extraordinarily critical area of

[4] Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended principally in sections of 47 U.S.C.).

interstate commerce at a time of revolutionary technological change and commercial ferment in the communications industry. Finally, it could needlessly prejudice the adjudication of the constitutionality of other provisions of the 1992 Cable Act, such as Section 19, which differ historically, factually and remedially from the must carry provisions.

It is most important to avoid the creation of a hierarchy of First Amendment regimes applicable to different video programming distribution technologies. The First Amendment rights of electronic media providing information and entertainment to the American public should not turn upon the particular technology used to distribute that programming. The media of distribution are immaterial to the viewer. In light of the technological trend toward transmission and compression of digital data as the common denominator of all modes of delivery of video programming, there is no reasoned basis for according wired delivery systems, such as cable, superior First Amendment rights to alternative multichannel video programming distributors such as DBS. Instead, the Court should articulate a jurisprudential model of analysis which focuses upon the unique facts surrounding must carry, the precise extent to which it may or may not implicate the First Amendment and the import of must carry to vindicate the First Amendment rights of viewers which are paramount. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

ARGUMENT

I. THIS COURT SHOULD CRAFT A NARROW RULING WHICH ADDRESSES THE PRECISE FACTS OF THE MUST CARRY PROVISIONS AND AVOIDS PREJUDGING CONSTITUTIONAL CHALLENGES TO OTHER PROVISIONS OF THE 1992 CABLE ACT.

One of the most fundamental tenets of constitutional adjudication is that the Court will not " 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *Kremens v. Bartley*, 431 U.S. 119, 137 (1977) (quoting *Liverpool, N.Y. & P.S.S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885)); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-55 (1951) (Frankfurter, J., concurring). The presence of First Amendment issues does not negate this jurisprudential principle. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) ("Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.").

The reasons for applying this time-honored rule to the instant case are especially compelling. First, appellants have challenged virtually every significant provision of the 1992 Cable Act on constitutional grounds identical or similar to those asserted here. Yet, there are multitudinous critical differences among these provisions in terms of their intended effect on market structure, relationship to content of speech and substantial state interests to be furthered. The United States District Court for the District of Co-

lumbia recently upheld the constitutionality of much of the 1992 Cable Act, specifically including Section 19, the program access provisions.[5] That decision is currently on appeal and may ultimately come before this Court. Under these circumstances, the Court should strive to avoid prejudging these other provisions. It can best do so by framing its decision narrowly to encompass only the particular facts and law essential to disposition of the must carry question before the Court.[6]

Secondly, an unduly broad ruling regarding the First Amendment status of cable television could have significant adverse consequences for the American public and could effectively reconfigure the media landscape. A sweeping decision conferring preferential First Amendment status upon cable vis-a-vis DBS, broadcasting, telephone or other wireless media would mean that cable technology would be more immune from government regulation than competing electronic media. Such a result would weaken existing competition to cable and potentially thwart or retard the emergence of new sources of competition from developing technologies such as DBS. It would thereby

[5] *Daniels Cablevision v. United States*, No. 92-2292, 1993 U.S. Dist. LEXIS 12806 (D.D.C. Sept. 16, 1993) (Jackson). *Amici* strongly support the court's decision in that case upholding the program access provisions as "content neutral regulatory measures designed to correct a market to which access was controlled by those who own the technology." 1993 U.S. Dist. LEXIS 12806, at *15.

[6] As appellant Turner Broadcasting System, Inc. notes in its Brief at 35, ". . . the Court need *not* decide the question of whether the First Amendment protection afforded cable television is in every respect co-extensive with that of the print press. . . ." (emphasis added).

undermine the primary purposes of the 1992 Cable Act, to promote competition to cable and protect consumers.[7] We urge the Court to exercise great care not to turn the 1992 Cable Act on its head by an unnecessarily broad ruling in this case.

II. THE NATURE OF THE GOVERNMENTAL RESTRICTION RATHER THAN THE MEDIUM OF DISTRIBUTION SHOULD PROVIDE THE FRAMEWORK FOR THE APPROPRIATE LEVEL OF CONSTITUTIONAL REVIEW.

The appellants argue that the must carry rules should be analyzed under a strict scrutiny standard. The linchpin of that argument is that cable television generally is more akin to the print media than to broadcasting, which, they contend, is subject to lesser protection under the First Amendment. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Therefore, they suggest that the appropriate standard of constitutional review should be analogous to this Court's First Amendment treatment of the print press

[7] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(b)(1)-(b), 106 Stat. 1460, 1463 (1992) ("It is the policy of the Congress in this Act to - (1) promote the availability to the public of a diversity of views and information through cable television and other video distribution media; [and to] (2) rely on the marketplace, to the maximum extent feasible to achieve that availability."). *See also* S. Rep. No. 92, 102d Cong., 1st Sess. 1 (1991) ("The purpose of this legislation is to promote competition in the multichannel video marketplace and to provide protection for consumers against monopoly rates and poor customer service."); H.R. Rep. No. 628, 102d Cong., 2d Sess. 26 (1992) ("The legislation will protect consumers by preventing unreasonable rates, by improving the cable industry's customer service practices, and by sparking the development of a competitive marketplace.").

[hereinafter referred to as the *Tornillo* or print model].[8] The Court should reject appellants' syllogism.

A. Strict Scrutiny Analysis Predicated Upon The Print Press Model Is An Inapposite Framework For Must Carry Review.

The *Tornillo* model is inappropriate for the reasons articulated by the government in its Motion of the Federal Respondents to Affirm, filed with the Court.[9] Instead, *amici* support the framework of analysis articulated by the telephone companies in their *amici* brief to the extent that they urge this Court to apply a level of judicial scrutiny commensurate with the nature of the governmental restriction on speech involved. *See* Brief of *Amici* United States Telephone Assn. at 4-5, 18 (stating that this Court's usual ap-

---

[8] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), relied upon by appellants. *See, e.g.*, Brief for Appellant Time Warner Entertainment, L.P. ("TWE Brief") at 23; Brief for Appellant Turner Broadcasting System, Inc. ("Turner Brief") at 30, 34; Brief for Appellant National Cable Television Association ("NCTA Brief") at 14, 30-34; Brief for Appellant Discovery Communications, Inc. ("Discovery Brief") at 32; and Brief for Appellant Daniels Cablevision, Inc. ("Daniels Brief") at 20.

[9] The government asserts that although the cable industry is not characterized by the same kind of physical scarcity as broadcasting, there are features of the industry which have created a similar communications bottleneck to the detriment of programming diversity and that governmental conduct has contributed greatly to cable's market power. Motion of the Federal Respondents to Affirm at 13-16. The government concludes that the power of private entities to silence other speakers justifies government intervention to promote a diversity of programming and information, whether that market power derives from physical scarcity, economic monopoly, advantages secured through governmental action, or a combination of the three as in the case of the cable industry. *Id.* at 22.

proach to First Amendment cases is to focus primarily on the nature of the restriction). By rejecting the print model as an analytical framework, this Court will reduce substantially the risk of prejudging questions that may arise in adjudicating the constitutionality of other provisions of the 1992 Cable Act, such as Section 19's program access provisions.

B. *O'Brien* Provides An Appropriate Framework For Constitutional Review Of Government Regulations That Incidentally Restrict Expressive Content.

If this Court deems that must carry regulations are not purely structural, economic regulation, but instead implicate some element of expressive content, the appropriate framework of constitutional review is the intermediate level of scrutiny established by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968) and interpreted in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).[10] The *Ward* Court held

> [l]est any confusion [on the *O'Brien* standard] remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.

491 U.S. at 798.

---

[10] Application of this intermediate standard of review to must carry is supported strongly by *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding ordinance limiting the location of adult theatres because purpose was to prevent "secondary effect" such as crime unrelated to the suppression of free expression).

Thus, the analysis of the nature of the restriction on expression turns on whether it is a "content-neutral" restriction. The *Ward* Court further elaborated that

> [t]he principal inquiry in determining content neutrality. . . is whether the government has adopted a regulation of speech *because of disagreement with the message it conveys. . . . The Government's purpose is the controlling consideration.* A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.

491 U.S. at 791 (emphasis added).

By establishing *O'Brien* and its progeny as the appropriate framework of analysis of the 1992 Cable Act's constitutionality, this Court will enhance the ability of lower courts to differentiate between provisions such as Section 19, the sole purpose of which is to achieve economic competition utterly without regard to the content of the programming, and other provisions which may be less clear.

C. The Must Carry Provisions Are Not Unconstitutional Because They "Single Out" The Cable Industry.

Appellants seek to distinguish cases upholding structural, economic regulations on media industries[11] by citing a string of cases that they claim stand for the proposition that "singling out" a particular segment of the press triggers heightened scrutiny. *See, e.g.*, TWE Brief at 27; NCTA Brief at 16 (citing inter alia, *Leathers v. Medlock*, ___ U.S. ___ , 111 S. Ct. 1438, 1447 (1991)). The cases do not so hold. The Court should reject this argument.

[11] *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

The regulations involved in the cited cases all were challenged because they were content-based. According to this Court, a regulation which "singles out" members of the media is *not* constitutionally suspect *unless* "it threatens to *suppress the expression of particular ideas or viewpoints.*" *Leathers*, 111 S. Ct. at 1443 (emphasis added); *see also Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (FCC multiple ownership rules do not violate the First Amendment rights of broadcasters by singling them out).

Indeed, lower courts have upheld the constitutionality of regulations that specifically target the cable industry to remedy anticompetitive abuses. In *Warner Cable Communications v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, ___ U.S. ___ , 111 S. Ct. 2839 (1991), the Eleventh Circuit rejected a constitutional challenge to a municipal ordinance permitting the operation of municipally-owned cable systems, the purpose of which was to foster competition to cable. The court held that the challenge failed to "assert a protected first amendment interest even if the City-owned system will surely render Warner's continued operation in Niceville economically infeasible." *Id.* at 636.

Similarly, in *Storer Cable v. City of Montgomery, Ala.*, 806 F. Supp. 1518 (M.D. Ala. 1992), the district court upheld two ordinances against constitutional

challenge that contained virtually the same core prohibitions as embodied in Section 19's program access provisions. The *Storer* court unequivocally rejected plaintiff's argument that the regulation "singles out" the cable industry and "infringes" on freedom of speech, concluding that the ordinance

> . . .is a legitimate trade practice regulation which may change the manner in which the plaintiffs conduct some of their business dealings, but does not in any way impair expressive activity or unreasonably 'single out' the press for burdensome treatment.

Storer, 806 F. Supp. at 1557-58.

Finally, the cable appellants' argument, taken to its logical conclusion, would erroneously suggest that Congress cannot enact industry-specific regulation involving the communications industry, including content-neutral economic regulation, without running afoul of the First Amendment. This line of reasoning neglects the deference courts have traditionally given acts of Congress under the Commerce Clause's broad grant of authority to regulate interstate commerce[12], including radio, broadcasting, and cable television. *See*

---

[12] U.S. Const. art. I, § 8, cl. 3. *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 323-34 (1981) ("It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality' . . . . A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between regulatory means selected and the asserted ends.") (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)) (other citations omitted).

United States v. Midwest Video Corp., 406 U.S. 649 (1972); *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

III. THE COURT SHOULD SCRUPULOUSLY AVOID CONFERRING SUPERIOR FIRST AMENDMENT STATUS UPON CABLE RELATIVE TO COMPETING ELECTRONIC MEDIA

This case comes before the Court at a time of enormous technological change and frenzied commercial activity in the multichannel video programming marketplace. The advent of fiber optic wire with its almost limitless broadband capacity and the scientific breakthrough enabling distributors to transmit, compress and receive video programming in digital form pave the way for new entrants, such as DBS operators like DirecTv, telephone companies and even electric utilities to provide competition to cable, the objective most sought by the Congress in the 1992 Cable Act. From the viewers' perspective, however, the images viewed through the "TV screen" are the same regardless of the distribution medium, (*e.g.* cable, broadcast, satellite, telephone) used to transmit them. In other words, the transmission medium for the video information is transparent to the viewer. To vindicate viewers' First Amendment rights and to ensure that viewers obtain the benefits of competition promised by the 1992 Cable Act and made possible by technological advances, the Court should refrain from establishing preferred First Amendment status for cable relative to other multichannel video programming distributors.

A. The Paramount First Amendment Rights of Viewers Militate Against Greater First Amendment Protection for Cable Than That Afforded Its Competitors.

The 1992 Cable Act sought to increase the diversity of voices and viewpoints available to the public through a series of structural economic measures, such as Section 19, intended to foster competition to cable. In so doing, Congress reaffirmed the overriding importance of the link between diversity and the constitutional principle that the First Amendment rights of listeners and viewers are "paramount," transcending the rights of service providers. *Red Lion*, 395 U.S. at 390.[13]

The strength of the diversity principle as the essential safeguard of viewers' First Amendment rights has been established by an unbroken line of cases. *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) (rejecting ban on editorializing by noncommercial public radio stations while reaffirming the virtue of a diversity of viewpoints); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (upholding ban on newspaper/broadcast station cross-ownership); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding multiple ownership rules); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (upholding chain broadcasting rules regulating relationship between networks and affiliates).

[13] The *Red Lion* Court made a further observation most pertinent to the 1992 Cable Act:

> [I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, *rather than to countenance monopolization of that market*, whether it be by the Government itself or a private licensee.

Id. (citing *Associated Press v. United States*, 326 U.S. 1 (1945) (emphasis added)).

The diversity principle could be severely eroded were this Court to confer preferred First Amendment status on cable. From the viewer's perspective, technological differences between one multi-channel video programming provider and another are irrelevant. Where the video programming is indistinguishable to the viewer—whose rights are paramount—it would be anomalous to afford one service provider unencumbered discretion to restrict the diversity of voices available to that viewer while denying that authority to its counterpart simply because the former utilizes an optical fiber or coaxial cable to distribute its programming while the latter employs satellites or the airwaves.

In fact, critically important technological developments argue against adoption of stricter First Amendment standards for wired providers such as cable. For example, *amici* telephone companies observe that signal compression technologies have served to increase the transmission capacities of wireline broadband networks. Brief of *Amici* Telephone Companies at 11. The same process of digital compression has been adopted by DBS and will be used in digital television to increase the capacity, and therefore the efficiency, of their media.[14]

[14] *See* Rosenthal, *Broadcast TV Networks Eyeing Compression Gear*, Electronic Media, Jan. 18, 1993; *see also* Boyle, *Satellite Ops Brace for Digital Compression*, Broadcasting & Cable, Feb. 22, 1993.

Finally, cable remains subject to administrative or regulatory scarcity. The authority of each cable operator to operate its system in the first instance stems from a government-issued franchise that is not available indiscriminately to anyone who may desire it. Just as "it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few," *Red Lion*, 395 U.S. at 388, so also has it become necessary for Government to intervene to regulate the construction of cable television systems in communities throughout the country. Because, as in broadcasting, not every aspiring cable operator may undertake to construct and operate a system, "it is idle to posit an unabridgable First Amendment right . . . comparable to the right of every individual to speak, write, or publish." *Id.*

For these reasons, elevating the First Amendment rights of one technological mode of programming distribution, *i.e.*, cable, over the First Amendment rights of alternative distribution technologies, *e.g.*, broadcasting, DBS, etc., would do violence to the viewer's First Amendment rights which are paramount and would also raise serious equal protection concerns.[15]

---

[15] To the extent that multichannel video programming distribution technologies are similarly situated, they should be similarly treated. Rooted in the equal protection guarantees of the Fifth and Fourteenth Amendments to the Constitution is the notion that governmental classifications must be based on some reasonable "ground of difference having a fair and substantial relation to the object of the legislation, *so that all persons similarly circumstanced shall be treated alike.*" *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (emphasis added); *see also* Tribe, *American Constitutional Law* § 16-1 (2d ed. 1988) ("[E]quality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles.").

B. The Court Should Rule Narrowly to Preserve Congress' Ability to Make the Factual Determinations that Will Be Required to Reconcile the Interests of Viewers and Service Providers in a Dynamic and Converging Communications Marketplace.

The foregoing discussion illustrates the incredibly dynamic nature of today's communications marketplace. This Court historically has recognized the virtue in preserving its ability to adapt to an uncertain and rapidly-changing factual landscape. Accordingly, while this Court does not and should not " ' 'defer' to the judgment of Congress . . . on a constitutional question,' " it must nonetheless "play close attention to the expertise of the Commission and the fact finding of Congress." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 569 (1990). Moreover,where the circumstances present particularly complex policy questions the Court must afford Congress' findings and the Commission's expertise "great weight." *Id.* (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)); *Cf. United States v. Midwest Video Corp.*, 406 U.S. 649, 677 (1972) (Douglas, J., dissenting) ("The policies reflected in the plurality opinion may be wise ones. But whether [the policy should exist] is a decision that we certainly are not competent to make and in my judgment the Commission is not authorized to make. Congress is the agency to make the decision . . . .").

The widespread technological and structural changes underway in the communications industries are test-

ing the existing regulatory framework at every turn. Congress and the Executive Branch are poised to respond. A number of far-reaching bills have already been introduced by key members of the House and Senate in the 103rd Congress, and more are expected.[16] As the Court considers the constitutionality of the must carry provisions of the 1992 Cable Act, considerations of comity also caution against issuance of a broad ruling that might unnecessarily impair Congress' ability to respond effectively to this challenge.

CONCLUSION

Amici respectfully urge this Court to issue a narrow ruling tailored to the precise facts and questions of law essential to the adjudication of the constitutionality of the must carry provisions, thereby diminishing the possibility of prejudging challenges to other provisions of the 1992 Cable Act, such as Section 19. In reaching its decision, the Court should reject appellants' invitation to accord preferred First

---

[16] S. 1086, 103d Cong., 1st Sess., 139 Cong. Rec. S7023-28 (1993) ("Telecommunications Infrastructure Act of 1993" cosponsored by Senators Daniel Inouye and John Danforth); H.R. 3636, 103d Cong., 1st Sess. (1993) ("National Communications and Information Infrastructure Act of 1993" cosponsored by Representative Edward Markey and Jack Fields); H.R. 3626, 103d Cong., 1st Sess. (1993) ("Antitrust Reform Act of 1993" cosponsored by Representatives John Dingell and Jack Brooks). *See also Administration Planning Complete Overhaul of Communications Act*, Communications Daily, Nov. 12, 1993 (reporting that the Director of the National Telecommunications and Information Administration ("NTIA"), Larry Irving, has stated that the Executive Branch is urging Congress to pass a complete revision of the Communications Act of 1934 during this Congress.).

Amendment status to cable relative to competing electronic media.

Respectfully submitted,

JOHN B. RICHARDS
KELLER & HECKMAN
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20004
(202) 434-4100

Counsel for National Rural Telecommunications Cooperative

LAWRENCE R. SIDMAN
Counsel of Record
ERIC T. WERNER
ELIZABETH J. SADOVE
KATHY D. SMITH
VERNER, LIIPFERT, BERNARD, MCPHERSON & HAND, Chartered
901 - 15th Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-6000

Counsel for DirecTv, Inc.

December 7, 1993